



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Brad C. Deutsch, Esq.
Garvey Schubert Barer
1000 Potomac Street, NW
Suite 200
Washington, DC 20007

JUN 15 2018

RE: MUR 7261

Dear Mr. Deutsch:


On July 13, 2017, the Federal Election Commission notified your clients, Levi for Colorado and Paula Sandoval, in her official capacity as treasurer (the "Committee"), and Levi Tillemann of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint and information provided by your clients, the Commission, on June 7, 2018, voted to dismiss the allegations that Levi Tillemann violated 52 U.S.C. § 30102(e) and that Levi for Colorado and Paula Sandoval in her official capacity as treasurer violated 52 U.S.C. §§ 30103(a) and 30104(a). The Commission cautions Mr. Tillemann and the Committee to take steps to ensure compliance with the Act's registration and reporting requirements. Accordingly, the Commission closed its file in this matter.

The Factual and Legal Analysis, which more fully explains the basis of Commission's decision, is enclosed. Documents related to the case will be placed on the public record within 30 days. See Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016).

If you have any questions, please contact Jonathan A. Peterson, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,


Assistant General Counsel
Lynn Y. Tran

Enclosure
Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**
3

4 **RESPONDENTS:** Levi for Colorado and Paula Sandoval MUR 7261
5 in her official capacity as treasurer
6 Levi Tillemann
7

8 **I. INTRODUCTION**
9

10 The Complaint alleges that Levi Tillemann and his authorized committee, Levi for
11 Colorado and Paula Sandoval in her official capacity as treasurer ("the Committee"), violated the
12 Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations
13 by failing to file disclosure reports with the Commission after Tillemann became a candidate.
14 The Complaint alleges that Tillemann's public statements and social media posts show that he
15 became a candidate before he filed his Statement of Candidacy on July 9, 2017. Tillemann and
16 the Committee argue that he was merely "testing the waters" before he decided to become a
17 candidate.

18 Based on the circumstances of this case, the Commission dismisses the allegations that
19 Respondents violated 52 U.S.C. §§ 30102(e), 30103(a), and 30104(a).

20 **II. FACTUAL BACKGROUND**

21 Levi Tillemann is a Democratic candidate for Colorado's Sixth Congressional District.¹
22 Tillemann filed his Statement of Candidacy with the Commission on July 9, 2017, and
23 designated Levi for Colorado as his authorized committee.² The Committee filed its Statement

¹ Response at 1-2 (Sept. 5, 2017).

² See FEC Form 2, Levi for Colorado (July 9, 2017).

1 of Organization the next day.³ The Committee had raised more than \$5,000 by May 24, 2017,
2 and spent more than \$5,000 by June 6, 2017.⁴

3 The Complaint implicitly argues that Tillemann's public statements before he declared
4 his candidacy show that he had already decided to run for Congress and therefore could not rely
5 on the Act's "testing the waters" exemptions.⁵ In support, the Complaint cites five examples of
6 activities that show Tillemann decided to become a candidate earlier than July 9, 2017:
7 statements on the Committee's Crowdpac page;⁶ similar statements on the Committee's official
8 website;⁷ statements Tillemann made on his personal Twitter account;⁸ content on Tillemann's
9 YouTube channel;⁹ and paid advertisements on Facebook allegedly supporting Tillemann's
10 candidacy.¹⁰

11 Respondents deny any violation occurred. They contend that none of Tillemann's
12 statements indicate that he had decided to run for Congress before June 27, 2017.¹¹ They also
13 argue that while the Committee did pay to "boost" its Facebook posts, it did so for "polling"

³ See FEC Form 1, Levi for Colorado (July 10, 2017).

⁴ See 2017 October Quarterly Report, Levi for Colorado (Oct. 15, 2017).

⁵ The Complaint was signed and notarized on July 7, 2017, before the Committee filed its Statement of Organization and Tillemann filed his Statement of Candidacy, and alleges violations against the Levi for Colorado Exploratory Committee. See Complaint at 2 (July 10, 2017). According to the Committee's 2017 October Quarterly Report, it and the Exploratory Committee are the same entity. 2017 October Quarterly Report at 5, Levi for Colorado.

⁶ Compl. at 1, Ex. D. Crowdpac is a non-partisan, for-profit corporation created to help voters find and support candidates who share their priorities and positions on issues and donate to those candidates. See Advisory Op. 2014-17 (Crowdpac).

⁷ Compl. at Ex. E.

⁸ *Id.* at Ex. C.

⁹ *Id.* at Ex. B.

¹⁰ *Id.* at Ex. A.

¹¹ Resp. at 1-2.

1 purposes, which is consistent with testing the waters activities.¹² Respondents explain that they
2 were measuring support for Tillemann by tracking “likes” on Facebook. As to the YouTube
3 videos, Respondents state that the Committee expended no money to create them, and they do
4 not contain any mention of Tillemann’s election or candidacy. Finally, they argue that
5 Respondents complied with all filing requirements, and would report all testing the waters
6 activity in the Committee’s October Quarterly Report.¹³

7 **III. LEGAL ANALYSIS**

8 A “candidate” is “an individual who seeks nomination for election, or election, to Federal
9 office.”¹⁴ Under the Act, an individual “shall be deemed to seek nomination for election, or
10 election . . . if such individual has received contributions aggregating in excess of \$5,000 or has
11 made expenditures aggregating in excess of \$5,000” or “has given his or her consent to another
12 person to receive contributions or make expenditures on behalf of such individual and if such
13 person has received such contributions aggregating in excess of \$5,000 or has made such
14 expenditures aggregating in excess of \$5,000.”¹⁵ Within fifteen days of becoming a candidate,
15 the candidate must designate a principal campaign committee by filing a Statement of
16 Candidacy.¹⁶ The principal campaign committee must then file a Statement of Organization

¹² *Id.* at 2.

¹³ *Id.* at 3. The Committee filed its 2017 October Quarterly Report on October 15, 2017, covering its activity from May 18, 2017, through September 30, 2017. The Response was filed before the Committee’s October Quarterly Report was due.

¹⁴ 52 U.S.C. § 30101(2).

¹⁵ *Id.*

¹⁶ *Id.* § 30102(e)(1); 11 C.F.R. § 101.1(a); *see* Factual and Legal Analysis at 2-3, MUR 7116 (Russell); Factual and Legal Analysis at 5, MUR 6449 (Bruning).

1 within 10 days of its designation,¹⁷ and must file disclosure reports with the Commission in
2 accordance with 52 U.S.C. § 30104(a) and (b).

3 The Commission has established limited exceptions from these thresholds, which permit
4 an individual to test the feasibility of a campaign for federal office without becoming a candidate
5 under the Act. Commonly referred to as the “testing the waters” exceptions, 11 C.F.R. §§ 100.72
6 and 100.131 exclude from the definitions of “contribution” and “expenditure,” respectively,
7 those funds received, and payments made, to determine whether an individual should become a
8 candidate.¹⁸ “Testing the waters” activities include, but are not limited to, payments for polling,
9 telephone calls, and travel.¹⁹ An individual who is “testing the waters” need not register or file
10 disclosure reports with the Commission unless and until the individual subsequently decides to
11 run for federal office *or* conducts activities that indicate he or she has decided to become a
12 candidate.²⁰ All funds raised and spent for “testing the waters” activities are, however, subject to
13 the Act’s limitations and prohibitions.²¹ Once an individual becomes a candidate, all reportable
14 amounts from the beginning of the testing-the-waters period must be disclosed on the first

¹⁷ 52 U.S.C. § 30103(a).

¹⁸ The Commission has emphasized the narrow scope of these exemptions to the Act’s disclosure requirements. *See* Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) (“The Commission has, therefore, amended the rules to ensure that the ‘testing the waters’ exemptions will not be extended beyond their original purpose. Specifically, these provisions are intended to be limited exemptions from the reporting requirements of the Act . . .”). *See* 52 U.S.C. § 30101(8), (9).

¹⁹ 11 C.F.R. §§ 100.72(a), 100.131(a).

²⁰ *See id.*; *see also* Advisory Op. 1979-26 (Grassley).

²¹ 11 C.F.R. §§ 100.72(a), 100.131(a).

1 financial disclosure report filed by the candidate's committee, even if the funds were received or
2 expended prior to the current reporting period.²²

3 Commission regulations set out five non-exhaustive factors to be considered in
4 determining whether an individual has decided to become a candidate. Among other things, an
5 individual indicates that he or she has gone beyond "testing the waters" and has decided to
6 become a candidate by raising funds in excess of what could reasonably be expected to be used
7 for exploratory activities or undertaking activity designed to amass campaign funds that would
8 be spent after he or she becomes a candidate.²³ These regulations seek to draw a distinction
9 between activities directed toward evaluating the feasibility of one's candidacy, and conduct
10 signifying that one has reached a decision to become a candidate.²⁴

11 A review of Tillemann's activity prior to his candidacy announcement reveals
12 information that he had decided to become a candidate as early as May 11, 2017.²⁵ On that day,
13 the Committee changed its Facebook cover photo to a logo almost identical to the one Tillemann
14 is now using for his campaign, both of which include "U.S. Congress" near Tillemann's name.²⁶

²² *Id.* §§ 101.3, 104.3(a)-(b).

²³ *Id.* §§ 100.72(b), 100.131(b). The other factors listed in the regulations are (1) using general public political advertising to publicize his or her intention to campaign for federal office, (2) making or authorizing written or oral statements that refer to him or her as a candidate for a particular office, (3) conducting activities in close proximity to the election or over a protracted period of time, or (4) taking action to qualify for the ballot under state law. *Id.*

²⁴ See Advisory Op. 1981-32 (Askew).

²⁵ Although the Complaint alleges that the Committee's payments to Facebook violated the testing-the-waters rules because payments for "general public political advertising" are prohibited during the testing-the-waters period, the available information does not suggest that those expenditures were made "to publicize [Tillemann's] intention to campaign for Federal office," as required by Commission regulations. See 11 C.F.R. §§ 100.72(b), 100.131(b). The article the Complaint cites as evidence that the Committee paid for political advertising specifically states that Tillemann was not a declared candidate and was only considering a run. See Compl. at Ex. A.

²⁶ See Levi for Colorado, FACEBOOK (May 11, 2017) <https://www.facebook.com/leviforcolorado/>.

1 Videos posted to Levi for Colorado's YouTube page contain the same logo, and were posted
2 beginning on June 1, 2017.²⁷ It appears that Tillemann also posted videos with similar content
3 and the "U.S. Congress" logo to his personal YouTube page.²⁸ Two of these videos, posted on
4 June 9, 2017, included a link to the Committee's Crowdpac page with the statement "Help us
5 fight back by contributing \$5 today."²⁹

6 In addition to his logo, Tillemann made public statements prior to his candidacy
7 announcement indicating that he had decided to run. On June 13, 2017, Tillemann used his
8 personal Twitter account to state that that Representative Mike Coffman, the Sixth District's
9 sitting member of Congress, is "gonna have a bad time," and directed a comment at Tyler
10 Sandberg, a Coffman campaign operative, that Tillemann was "coming for you next."³⁰ The
11 tweet also includes the hashtags #victory and #2018.

12 It appears that Tillemann may have become a candidate at some point in May or June of
13 2017. Although Respondents may have violated the Act's filing and reporting requirements, the
14 Commission dismisses this matter pursuant to its prosecutorial discretion. It appears that
15 Respondents missed their deadlines to file as a candidate and register as a candidate committee
16 by about a month — but began filing well in advance of the June 2018 primary election. Though

²⁷ See, e.g., Levi for Colorado, *The Coal-Job Lie: What Republican Lawmakers Don't Want You To Know About Coal*, YOUTUBE (June 7, 2017), <https://www.youtube.com/watch?v=uGYpDXNOvis&t=1s>. The YouTube page contains five videos, posted between May 26 and July 6, 2017, on topics including clean energy and Pride Day. The content of the videos appears to be general statements on policy issues or current events, and does not directly discuss Tillemann's candidacy. However, the page's profile picture features the "Levi Tillemann U.S. Congress" logo, and each video posted on or after June 1, 2017, also bore the logo.

²⁸ See, e.g., Levi Tillemann, *Trump's war on the environment isn't about protecting coal jobs . . .*, YOUTUBE (June 9, 2017), <https://www.youtube.com/watch?v=xpgZ2UknxBU>.

²⁹ *Id.*

³⁰ Levi Tillemann (@levitd), TWITTER (June 13, 2017), <https://twitter.com/levitd/status/874658245549228032>.

1 these violations resulted in the Committee's failure to file a 2017 July Quarterly Report, the
2 amount of activity does not warrant the use of additional Commission resources. Accordingly,
3 the Commission exercises its prosecutorial discretion and dismisses the allegations but cautions
4 Levi Tillemann and Levi for Colorado and Paula Sandoval in her official capacity as treasurer
5 against similar violations.³¹

³¹ See *Heckler v. Chaney*, 470 U.S. 821 (1985).